

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>DANA DAVIES, et. al.,</b>	)	
	)	
<b>Plaintiffs</b>	)	
	)	
<b>v.</b>	)	<b>Civil No. 94-56-P-DMC</b>
	)	
<b>DATAPoint CORPORATION,</b>	)	
	)	
<b>Defendant</b>	)	

**MEMORANDUM DECISION ON DEFENDANT’S MOTION TO DISMISS AND/OR  
FOR SUMMARY JUDGMENT AND PARTIAL MOTION IN LIMINE<sup>1</sup>**

In this products liability case the plaintiffs seek damages for injuries allegedly caused by keyboards designed and manufactured by the defendant. Specifically, plaintiffs Dana Davies and Cynthia Bowen assert strict liability claims for design defect and failure to warn under 14 M.R.S.A. § 221 and common-law negligence claims based on defective design and failure to warn, to investigate dangers associated with the keyboards and to test the keyboards properly. Plaintiff Bobby Gene Bowen asserts a loss-of-consortium claim. All plaintiffs assert claims for punitive damages. The defendant now moves for summary judgment<sup>2</sup> on numerous grounds, and moves *in limine* to exclude certain expert testimony. For the reasons discussed below, I grant the motions in part and

---

<sup>1</sup> Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

<sup>2</sup> Although the defendant has actually moved to dismiss and/or for summary judgment, all aspects of the motion require consideration of matters beyond the pleadings. In accordance with Fed. R. Civ. P. 12(b), I treat the defendant’s motion as one for summary judgment under Fed. R. Civ. P. 56.

deny them in part.

## **I. Summary Judgment Standards**

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and “give that party the benefit of all reasonable inferences to be drawn in its favor.” *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); Fed. R. Civ. P. 56(e); Local R. 19(b)(2).

## **II. Factual Context**

## **A. The Defendant's Motion to Exclude Design Defect Testimony**

At the outset, the defendant's *in limine* motion raises a critical issue affecting the state of the summary judgment record. Specifically, I must decide whether to exclude certain testimony of the plaintiffs' expert Karl H.E. Kroemer, Ph.D., concerning design defects in the defendant's keyboards at issue, because of the plaintiffs' failure to supplement their Rule 26(a)(2) report in compliance with this court's November 10, 1994 Report of Scheduling Conference and Order (Docket No. 8) ("November 10, 1994 Scheduling Order"). Fed. R. Civ. P. 37(c)(1) states: "A party that without substantial justification fails to disclose information required by Rule 26(a) . . . shall not, unless such failure is harmless, be permitted to use as evidence . . . on a motion any . . . information not so disclosed."

### **1. The Discovery Dispute**

The plaintiffs commenced this action on March 8, 1994. The original deadline for providing Rule 26(a)(2) information was October 19, 1994. Report of Scheduling Conference and Order (Docket No. 5) at 3. On that date, the plaintiffs provided the following information with Dr. Kroemer's designation: Curriculum Vitae; State-of-the-Art Report on Cumulative Trauma Disorders (authored by Dr. Kroemer on March 30, 1992); Reviews of Publications Related to Keyboarding (authored by Dr. Kroemer on February 5, 1994); and Dr. Kroemer's deposition transcript from *Piester v. IBM* (July 22, 1994). Deft's Exh. 49 at exh. III.<sup>3</sup> Conspicuously absent was any information regarding the specific Datapoint keyboard models at issue in this case.

---

<sup>3</sup> Plaintiffs' and defendant's exhibits cited herein are exhibits referred to in the parties' respective statements of material facts.

On November 4, 1994, at the request of defense counsel and in response to their concern about the very limited Rule 26(a)(2) information the defendant had received, I held a scheduling conference, *see* November 10, 1994 Scheduling Order at 1, and directed the parties to confer and report back to the court on several matters, including the plaintiffs' submission of a supplemental expert report from Dr. Kroemer. Deft's Exh. 43 at exh. 7, p. 1. On November 9, 1994 the plaintiffs' attorney reported that, "[o]nce plaintiffs have [Datapoint's product specifications and source control documents], we can submit supplemental expert reports for . . . Dr. Kroemer within 10 working days . . . ." *Id.* at 2.<sup>4</sup> After conducting a further scheduling conference on November 9, 1994, I entered an order requiring *inter alia* the following:

2. The defendant shall produce by November 16, 1994 for inspection and testing, as agreed upon, five keyboard exemplars and shall produce related product specification control drawings pursuant to a confidentiality agreement among the parties upon the execution and return of that agreement to the defendant's counsel.

3. Within 10 working days of receiving the keyboard exemplars and referenced control drawings, the plaintiffs shall provide the defendant's counsel with supplemental Rule 26(a)(2) reports of . . . Dr. Kromer [sic].<sup>5</sup>

...

5. The foregoing notwithstanding, the plaintiffs' expert witness designations and

---

<sup>4</sup> The plaintiffs' counsel indicated in the same communication that the parties had not yet agreed on a confidentiality agreement to cover the documents at issue, and that if the defendant continued to refuse to produce them, the plaintiffs would be delayed in supplementing Dr. Kroemer's report. Deft's Exh. 43 at exh. 7, p. 2. On December 8, 1994 the court entered a general protective order. (Docket No. 10).

<sup>5</sup> Rule 26(a)(2)(B) requires that, except as otherwise directed by the court, an expert witness designation "shall . . . be accompanied by a written report prepared and signed by the witness." On January 31, 1995 the court, by local rule, dispensed with the requirement that Rule 26(a)(2) information be provided only in this format. *See* Local R. 18(g). This change, however, did not affect the plaintiffs' obligation to provide the defendant's counsel with supplemental reports by December 7, 1994 at the latest.

provision of Rule 26(a)(2) information shall be completed no later than December 7, 1994.

6. The plaintiffs agree to and shall make all of their designated experts available for deposition during the month of December 1994.

November 10, 1994 Scheduling Order ¶¶ 2-3, 5-6.

Despite the defendant's persistent efforts to schedule Dr. Kroemer's deposition, he was not made available to the defendant until March 1995. Deft's Exh. 43 at exh. 13. The defendant began Dr. Kroemer's deposition on March 3, 1995. Deft's Exh. 10 at 1. On that date, Dr. Kroemer testified that he believed he had received the specification control documents ("SCDs") from the plaintiffs' counsel "sometime in November [of 1994]," but that he "didn't look at them until just a few days ago." *Id.* at 7. He further stated that he had never been told that the keyboard exemplars were to be made available in November 1994 for his inspection and review and acknowledged that he had not been asked to prepare a formal report regarding them. *Id.* at 7, 11. The defendant asked Dr. Kroemer whether he had enough information to form opinions specific to the Datapoint keyboards:

Q Is it necessary for you to look at the Datapoint keyboards to review them for their particularities and for their specific designs to render such opinions or can you render such opinions without making such a formal examination?

A I have seen the specification for the keyboards, I have seen the documents provided originally by Datapoint, I have seen a copy of the measurements taken by Dr. Snyder and therefore I think that I am in a position to render a general opinion about the 8200 keyboards.

If there were any truly specific questions then I would have to see the keyboards.

Q In anticipation of your testimony in this case, if that comes to pass, would you expect that you would require the need to review these keyboards particularly?

A I don't know yet what questions I will be asked so I can't answer your

question with yes or no.

Q Has [the plaintiffs' counsel] indicated to you what opinions they intend to solicit from you in this case?

A No, not specifically. Only in terms of how do I feel about the ergonomics of those keyboards.

*Id.* at 22-23. One can reasonably conclude from this exchange that Dr. Kroemer had not yet formed discrete opinions concerning design defects specific to the Datapoint keyboards, particularly in light of the plaintiffs' failure to produce a supplemental expert report on such defects. The defendant, perhaps in reliance on this discussion, did not ask Dr. Kroemer on March 3, 1995 about any opinions he might have held at that time concerning defects specific to the Datapoint keyboards.

The defendant filed its motion for summary judgment on the deadline for filing motions, April 10, 1995. November 10, 1994 Scheduling Order at 2. Dr. Kroemer's deposition, not completed on March 3, 1995, was continued to April 26, 1995. Pltfs' Exh. 52 at 4-5. The record does not reflect the reason for the lengthy delay in completing the deposition.<sup>6</sup>

At the continuation of his deposition on April 26, 1995, Dr. Kroemer stated that he had formed opinions regarding defects specific to the Datapoint keyboards *prior to* his March 3, 1995 deposition. *Id.* at 60. Despite this, Dr. Kroemer still had not written a report detailing his opinions as required by the court's November 10, 1994 Scheduling Order. *Id.* Dr. Kroemer also stated that he did not need to examine the keyboard exemplars in order to render opinions about defects specific to the Datapoint keyboards. *Id.* at 54.

---

<sup>6</sup> In addition to requiring that the plaintiffs make all of their designated experts available for deposition during December 1994, the court had set a March 23, 1995 deadline for completion of expert witness discovery. November 10, 1994 Scheduling Order at 2; January 11, 1995 Report of Scheduling Conference and Order (Docket No. 13) at 2.

In summary, based on the plaintiffs' representation that, within ten days of receiving the keyboard exemplars and SCDs, they would be able to submit a supplemental expert report for Dr. Kroemer, I ordered that complete Rule 26(a)(2) information be provided in that period and, in any event, no later than December 7, 1994. Although Dr. Kroemer received the SCDs in November 1994, he did not examine them until a few days before his March 3, 1995 deposition. As of April 26, 1995 Dr. Kroemer had not written a report of his opinions concerning the Datapoint keyboards.

Dr. Kroemer formed opinions regarding specific defects in the Datapoint keyboards at some point before his March 3, 1995 deposition. At no time, however, did the plaintiffs provide supplemental Rule 26(a)(2) information concerning Dr. Kroemer's opinions prior to the April 10, 1995 motion deadline. Nor have the plaintiffs ever sought an extension of the December 7, 1994 deadline. Their only explanation for their failure to comply with the deadline is that Dr. Kroemer was "unavailable" due to his involvement in other trials and his travels abroad. Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss and/or for Summary Judgment and Partial Motion in Limine (Docket No. 32) ("Plaintiffs' Memorandum") at 9 n.5.

## **2. Substantial Justification**

In order to be permitted to use Dr. Kroemer's design defect opinions in support of their opposition to the defendant's motion for summary judgment, the plaintiffs must show "substantial justification" for their failure to provide a supplemental Rule 26(a)(2) report. Fed. R. Civ. P. 37(c)(1). Consideration of the factors discussed in *United States v. Roberts*, 978 F.2d 17 (1st Cir.

1992), informs my decision on this matter.<sup>7</sup>

1. *The Nature of the Case.* This is a civil product liability case. *Roberts*, a drug-trafficking case, was “a criminal case involving serious accusations.” *Id.* at 22. The *Roberts* court noted “a strong public interest in adjudicating felony cases on the merits.” *Id.* While the public has less of an interest in the adjudication of private civil disputes on the merits, its interest in doing so is nevertheless substantial.

2. *Degree of Tardiness.* The original deadline for producing Rule 26(a)(2) reports was October 19, 1994. After hearing the parties, the court entered a scheduling order extending the outside deadline for doing so to December 7, 1994. Dr. Kroemer testified that he had not written such a report as of April 26, 1995. Significantly, the plaintiffs made no effort to seek an extension of the deadline.

3. *Reasons for Tardiness.* The plaintiffs do not dispute that they violated this court’s scheduling deadline. Plaintiffs’ Memorandum at 9 n.5. Presumably by way of excuse, they state that “the problems besetting the Plaintiffs in complying with scheduling deadlines . . . arose because Dr. Kroemer was unavailable for an extended period of time due to his involvement in trials in Minnesota, Philadelphia and New York and travels abroad.” *Id.* The plaintiffs themselves selected Dr. Kroemer as their expert on design defects. Neither the defendant nor this court should bear the burden of Dr. Kroemer’s other commitments and travel plans, especially in circumstances where no effort was made to seek an enlargement of the deadline from the court. The plaintiffs’ stated excuse falls far short of “substantial justification.”

---

<sup>7</sup> *Roberts*, of course, arose in much different circumstances. I find it useful, however, to take the kind of “panoramic view” employed by the *Roberts* court in evaluating the “substantial justification” issue before the court here.



4. *Character of the Omission.* Given the unambiguous language of the November 4, 1994 Scheduling Order, which set an outside December 7, 1994 deadline for supplementing Rule 26(a)(2) reports, the plaintiffs' failure to supplement the report even as of April 26, 1995 can only be characterized as deliberate or grossly negligent. *See Roberts*, 978 F.2d at 23.

5. *Prejudice.* The plaintiffs argue that their failure to comply with the deadline caused the defendant no prejudice. This assertion is wide of the mark. While preparing its motion for summary judgment and as of the deadline date on which it filed it, no supplemental report having been furnished and Dr. Kroemer having indicated in his March 3, 1995 deposition that he had neither inspected the keyboard exemplars or been asked by his own clients for his opinions concerning them, the defendant had no reason to anticipate that it would be confronted with Dr. Kroemer's subsequently articulated expert opinions in defense of the motion. Had the defendant received the required supplemental report in a timely manner, it would have learned that the plaintiffs did indeed intend to elicit expert opinion testimony from Dr. Kroemer on the design defect issues and would have had a detailed sketch of those opinions. It then would have been able to review his opinions with its own expert and conduct an informed deposition examination of Dr. Kroemer regarding these issues in general and Dr. Kroemer's opinions in particular. At this juncture, the defendant would have been able to make an intelligent decision as to whether or not to pursue summary judgment at all or at least summary judgment as it relates to the design defect claims. And if it decided to seek summary judgment on the design defect claims, it would then have been in a position to insure that the summary judgment record included opinion testimony of its own expert as it might bolster its

summary judgment claim. All of this was unfairly denied the defendant.<sup>8</sup>

6. *Institutional Interests.* “The court, too, has a significant interest in the punctilious observation and strict enforcement of its procedural rules, including temporal requirements.” *Roberts*, 978 F.2d at 23. The plaintiffs have done far more than misinterpret the court’s order or miss a deadline by one day. They have ignored this court’s explicit order to provide a supplemental Rule 26(a)(2) report by December 7, 1994 at the latest. The plaintiffs acknowledge their violation and cite Dr. Kroemer’s schedule as an apparent excuse. A scheduling order “is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.” *Gestetner Corp. v. Case Equip. Co.*, 108 F.R.D. 138, 141 (D. Me. 1985). The November 10, 1994 Scheduling Order reflects this court’s determination, after consulting with counsel, of “a reasonable and expeditious schedule on the basis of which to require counsel to complete the work necessary to prepare the case for trial.” *Id.* Rule 26(a)(2)’s disclosure requirements ensure that “opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses.” Fed. R. Civ. P. 26(a)(2) advisory committee’s note (1993 amendment). By violating the December 7, 1994 deadline, the plaintiffs have impaired the defendant’s opportunity to prepare its case, and thus subverted an important purpose of this court’s scheduling order and Rule 26(a)(2).

7. *Utility of the Proposed Testimony.* In this case, permitting Dr. Kroemer’s testimony

---

<sup>8</sup> The plaintiffs argue that the defendant nevertheless suffered no prejudice because they provided, on October 19, 1994, materials setting forth Dr. Kroemer’s generic opinions on keyboard defects and state-of-the-art knowledge. Rule 26(a)(2), however, entitles the defendant to more than Dr. Kroemer’s generic opinions. Rule 26(a)(2) requires, *inter alia*, “a complete statement of all opinions to be expressed and the basis and reasons therefor.” Fed. R. Civ. P. 26(a)(2)(B). Indeed, that is precisely why this court ordered the plaintiffs to provide a supplemental Rule 26(a)(2) report.

on alleged defects in the keyboards would certainly be more than an “empty exercise.” *Roberts*, 978 F.2d at 22. Dr. Kroemer is the plaintiffs’ only design defect expert. Yet this factor alone cannot excuse the plaintiffs’ egregious violation of the November 10, 1994 Scheduling Order. If the importance of the proposed testimony could outweigh all the other factors, then excluding testimony would never be an option where a party failed to make Rule 26(a)(2) disclosures on a critical issue. Such a reading would nullify the “substantial justification” requirement of Rule 37(c)(1).

I conclude from this analysis that the plaintiffs have fallen woefully short of demonstrating “substantial justification” for their failure to provide Rule 26(a)(2) information. Furthermore, as discussed above in the context of the prejudice factor, I find that the plaintiffs’ failure was not harmless. Fed. R. Civ. P. 37(c)(1). Pursuant to Rule 37(c)(1), the plaintiffs are precluded from using Dr. Kroemer’s design defect testimony in opposition to the defendant’s motion for summary judgment.

## **B. Material Facts**

Viewed in the light most favorable to the plaintiffs, the material evidence in the summary judgment record may be summarized as follows: The defendant first designed and manufactured the Datapoint 8200 terminal with an integrated (non-detachable) keyboard in 1978. Deft’s Exh. 44 ¶ 1. Datapoint first designed the Datapoint 8200 terminal with a detachable keyboard in 1981 or 1982.<sup>9</sup> *Id.* ¶ 2. After completing the design and manufacture of the Datapoint 8200 with the detachable keyboard, the defendant phased out production of the Datapoint 8200 with the integrated keyboard.

---

<sup>9</sup> Datapoint 8200s with detachable keyboards are sometimes referred to in the record as 8220s. *See, e.g.*, Pltfs’ Exh. 52 at 194.

*Id.* ¶ 3. It began to phase out production of the Datapoint 8200 with the detachable keyboard in 1984. *Id.* ¶ 4.

In 1981 the Thomas Agency purchased computer equipment, including Datapoint 8200 terminals with integrated keyboards, from a company then called the New Hampshire Credit Bureau. Deft's Exh. 18 at 18, 23. In 1986 the Thomas Agency bought some Datapoint 8200 terminals with detachable keyboards. *Id.* at 25-26.

Plaintiff Dana Davies worked as a collection agent for the Thomas Agency in Portland, Maine, beginning part-time in January 1989, and full-time in August or September 1991. Deft's Exh. 1 at 71-72; Deft's Exh. 2 at 154. Davies worked primarily on a Datapoint 8200 terminal with an integrated keyboard. Deft's Exh. 32 at 4-5. From time to time, although rarely, she also worked on a Datapoint 8200 terminal with a detachable keyboard. *Id.* at 4.

Davies began to experience aching in her arms, throbbing in her elbows, numbness, tingling and stiffness in her fingers, and lack of dexterity in her hands. Deft's Exh. 2 at 161-62, 187. In 1992 she began treatment with Jean J. Labelle, M.D., a plastic, reconstructive and hand surgeon. Deft's Exh. 13 at 32; Deft's Exh. 14 at 11. Dr. Labelle diagnosed Davies as having bilateral ulnar cubital symptoms, mild median nerve neuritis and irritation, and flexor and elbow tendinitis. Deft's Exh. 14 at 17. His opinion is that Davies' use of the Datapoint 8200 keyboard while employed at the Thomas Agency caused her upper extremity injuries. *Id.* at 55.

Plaintiff Cynthia Bowen worked for the Thomas Agency as a collection specialist beginning in September 1985, and as a supervisor beginning in approximately 1989. Deft's Exh. 4 at 18-19, 80; Deft's Exh. 37 at 3. Bowen did most of her work on a Datapoint 8200 terminal with an integrated keyboard. Deft's Exh. 37 at 3. She also worked on a Datapoint 8200 terminal with a

detachable keyboard. *Id.* at 3-4.

In 1988 Bowen first experienced symptoms such as tingling in her fingers. Deft's Exh. 4 at 91-92, 97. By 1991 her symptoms had advanced to pain in both wrists and arms. *Id.* at 111. She commenced treatment that year with William H. Leschey, Jr., M.D., a board-certified neurologist, who diagnosed carpal tunnel syndrome in both wrists. Deft's Exh. 16 at 7, 16-17. Bowen also saw Verne Weisberg, M.D., a board-certified plastic surgeon with a sub-specialty in hand surgery, in 1991. Deft's Exh. 15 at 10, 21. Dr. Weisberg performed carpal tunnel release surgeries on both wrists. *Id.* at 37-38, 61. It is Dr. Weisberg's opinion that Bowen's upper extremity injuries are directly related to her use of the Datapoint keyboards. *Id.* at 99. Donald P. Endrizzi, M.D., an orthopedic surgeon specializing in shoulder problems, treated Bowen for bilateral impingement syndrome in her shoulders, which included rotator cuff tendinitis. Deft's Exh. 17 at 3, 13-14. In the opinion of Laura S. Welch, M.D., Bowen's Datapoint keyboard use caused her shoulder injuries. Deft's Exh. 9 at 292, 294.

The term "cumulative trauma disorders" ("CTDs") refers to a group of conditions, such as carpal tunnel syndrome, ulnar nerve irritation, tendinitis and muscle injuries, that can result from small traumas occurring repeatedly to an area of the body. Deft's Exh. 13 at 34-35; Deft's Exh. 15 at 75. Davies' and Bowen's conditions have been diagnosed as CTDs. Deft's Exh. 13 at 34-36; Deft's Exh. 15 at 99.

According to a review of the literature by Dr. Kroemer, by the end of the 1970s the medical basis for causation and treatment of CTDs was common knowledge in the medical profession, and the relationship between CTDs and keyboard use was well established. Deft's Exh. 30 at 39-40.

### III. Statute of Limitations

The defendant claims that Cynthia and Bobby Gene Bowen's claims are barred by the applicable statute of limitations, 14 M.R.S.A. § 752. Section 752 bars civil claims commenced more than six years after the claim accrues. *Id.* I find that there is a genuine issue of material fact in dispute regarding when the Bowens' claims accrued.

The plaintiffs filed this action on March 8, 1994. Under section 752 a cause of action accrues when the plaintiff sustains a judicially cognizable injury, *Chiapetta v. Clark Assocs.*, 521 A.2d 697, 699 (Me. 1987), *i.e.*, "an injury for which a potential plaintiff is entitled to seek judicial vindication," *Williams v. Ford Motor Co.*, 342 A.2d 712, 714 (Me. 1975). If Cynthia Bowen's injuries were judicially cognizable before March 8, 1988, then the Bowens' claims are time barred.<sup>10</sup>

The defendant claims that Ms. Bowen recalled an incident of tingling in her fingers just before a firm lunch "when you could deduct it [the lunch] non-tax," Deft's Exh. 4 at 92-93, and cites the Internal Revenue Code amendments that reduced the business lunch deduction from 100 percent to 80 percent effective in 1987, *see* Tax Reform Act of 1986, Pub. L. No. 99-514, §§ 122(c)-(d), 142(a)-(b), 151(a), 100 Stat. 2109-10, 2117-19, 2121 (codified as amended at 26 U.S.C. § 274(a), (k), (n)). Datapoint argues, therefore, that the lunch occurred no later than 1986. Yet Bowen also testified that the lunch she was referring to occurred in 1988. Deft's Exh. 4 at 92. Bowen could have been mistaken about either the state of the tax laws or the year of the incident. The defendant

---

<sup>10</sup> The Bowens argue that Cynthia Bowen's cause of action did not "accrue" when she first experienced minor "tingling" symptoms. Alternatively, these plaintiffs argue that the court should apply the "discovery rule" in this case. *See Myrick v. James*, 444 A.2d 987, 996 (Me. 1982). Because I find that a genuine issue of material fact exists regarding whether those "tingling" symptoms occurred before or on or after March 8, 1988, I decline to address these arguments in deciding this motion.

cites Bowen's statement that she felt a tingling "at least" six months prior to the 1988 tingling, and perhaps as long as two years earlier. *Id.* at 97. If the 1988 incident occurred between September and December, the "earliest" tingling incident could have occurred six months earlier, between March and June 1988. Viewing the record in the light most favorable to the plaintiffs, a fact finder could find that Cynthia Bowen first experienced symptoms relating to her keyboard use after March 7, 1988.

#### **IV. Claims Relating to Datapoint Models 6600, 8600 and 8242**

The plaintiffs have waived all claims relating to Datapoint models 6600, 8600 and 8242. *See* Plaintiffs' Memorandum at 8. The defendant's motion is therefore granted as to all claims relating to these Datapoint keyboard models.

#### **V. Design Defect**

The defendant contends that the plaintiffs have produced no evidence to establish a design defect in the Datapoint 8200 keyboards. In opposing this contention, the plaintiffs rely exclusively upon the testimony of Dr. Kroemer. Since I have excluded Dr. Kroemer's design defect testimony, and because the plaintiffs cite no other evidence of design defect, I find there is no genuine issue of material fact concerning the plaintiffs' strict liability- and negligence-based design defect claims. The defendant's motion for summary judgment is granted as to these claims.

#### **VI. Failure to Warn**

The defendant asserts that it is entitled to summary judgment on the plaintiffs' strict liability-

and negligence-based failure-to-warn claims because a manufacturer's duty to warn must be measured at the time it manufactures the product in question. In response, the plaintiffs urge the court to impose a post-sale duty to warn.

To prevail on a strict liability failure-to-warn claim, the plaintiffs must demonstrate that the product was defective and unreasonably dangerous (*i.e.*, lacking an adequate warning) at the time of sale. 14 M.R.S.A. § 221. There is no post-sale duty to warn under section 221. *See Lorfano v. Dura Stone Steps, Inc.*, 569 A.2d 195, 197 (Me. 1990) (“We have construed [§ 221] as requiring that ‘[a] manufacturer has a responsibility to inform users and consumers of dangers about which he either knows or should know *at the time the product is sold.*’”) (emphasis added) (quoting *Bernier v. Raymark Indus., Inc.*, 516 A.2d 534, 540 (Me. 1986)).

The defendant argues more broadly that the plaintiffs' strict liability failure-to-warn claim must fail altogether because they cannot prove a design defect. This is not a correct statement of Maine law. As the First Circuit has recognized, “Even where a product is faultlessly made, it may be deemed ‘defective’ under section 221 if it is unreasonably dangerous to place the product in the hands of a user without a suitable warning and the product is supplied without such warning.” *Walker v. General Electric Co.*, 968 F.2d 116, 119 (1st Cir. 1992) (citing *Lorfano*, 569 A.2d at 196). Thus, an inadequate warning may itself be a section 221 defect. Inasmuch as I conclude that there is a genuine dispute as to whether Datapoint should have supplied a warning with the 8200 keyboards when they were distributed, *see infra*, the plaintiffs' strict liability failure-to-warn claim survives the defendant's summary judgment motion.

The plaintiffs contend that negligence principles give rise to a post-sale duty to warn and, recognizing that the Law Court has not yet announced such a duty, refer the court to decisions in



twelve other jurisdictions adopting some form of post-sale duty to warn. In *Williams v. Monarch Mach. Tool Co.*, 26 F.3d 228 (1st Cir. 1994), the First Circuit upheld the trial court's refusal to expand Massachusetts state law to include a post-sale duty to advise of new safety improvements.

Some courts have adopted the view that there are broad post-sale duties to warn, and there is some academic support for this extension. Yet, there is no suggestion that this expanded duty is the prevailing view, still less that Massachusetts has adopted any such expansion. "We have warned, time and again, that litigants who reject a state forum in order to bring suit in federal diversity jurisdictions cannot expect that new trails will be blazed."

*Id.* at 232 (quoting *Ryan v. Royal Ins. Co. of Am.*, 916 F.2d 731, 744 (1st Cir. 1990) (other citations omitted)). In this diversity-based action by plaintiffs who chose to press their state claims in federal court, I decline the invitation to write a new chapter in Maine law.

I next consider whether there are substantial trialworthy issues concerning the plaintiffs' strict liability- and negligence-based failure-to-warn claims. Under Maine law, a failure-to-warn claim, whether based in negligence or strict liability, requires a three-part analysis: (1) whether the defendant had a duty to warn the plaintiff; (2) whether the warning on the product, if any, was inadequate; and (3) whether the inadequate warning proximately caused the plaintiff's injury. *Pottle v. Up-Right, Inc.*, 628 A.2d 672, 675 (Me. 1993). The defendant argues that the plaintiffs cannot prove it had a duty to warn them of dangers associated with the 8200 keyboards.

Specifically, the defendant argues that the plaintiffs cannot demonstrate a duty to warn at the time the Datapoint equipment was sold. The equipment in question consists of the 8200 terminals with integrated keyboards and the 8200 terminals with detachable keyboards. Viewing the record in the light most favorable to the plaintiffs, it is possible that the terminals were manufactured in the same years as the Thomas Agency purchased them. Datapoint did not phase out the 8200 with the

integrated keyboard until 1981 or 1982, and only began to phase out the 8200 with the detachable keyboard in 1984. Thus, drawing all reasonable inferences in favor of the plaintiffs, one can conclude that the 8200s with integrated keyboards were manufactured in 1981, and the 8200s with detachable keyboards were manufactured in 1986.

The summary judgment record contains evidence sufficient to establish a duty to warn as early as 1981. In Dr. Kroemer's "State-of-the-Art Report on Cumulative Trauma Disorders," he observed that by the end of the 1970s the "relation between CTD and design and use of keyboards was well established." Deft's Exh. 30 at 40. This "relation" creates a trialworthy issue as to whether the defendant had a duty to warn the plaintiffs of dangers associated with keyboard use.<sup>11</sup>

The defendant's other arguments against the failure-to-warn claims are unavailing. First, it contends that the plaintiffs must demonstrate state-of-the-art evidence linking keyboard use with the specific injuries alleged, rather than with CTDs in general. The plaintiffs' conditions have been diagnosed as CTDs. Evidence of the relationship between keyboard use and CTDs, therefore, is sufficient to survive summary judgment on the duty-to-warn issue.

Second, the defendant suggests that, to the extent the plaintiffs might argue that it had a duty to warn that extended keyboard use could produce "fatigue and aches or soreness," it had no such duty because there is no duty to warn about dangers that are obvious to the user. *See Lorfano*, 569 A.2d at 197. Yet, the plaintiffs allege injuries far more severe than the "fatigue and aches or soreness" one might reasonably expect from extended work. Accordingly, the defendant's motion

---

<sup>11</sup> Although I have excluded Dr. Kroemer's design defect testimony, the plaintiffs' original Rule 26(a)(2) disclosure included Dr. Kroemer's "State-of-the-Art Report on Cumulative Trauma Disorders" and "Review of Publications Related to Keyboarding." Deft's Exh. 49 at exh. III. The plaintiffs may use Dr. Kroemer's testimony on state-of-the-art knowledge to oppose this motion for summary judgment.

for summary judgment on the plaintiffs' duty to warn claims is denied.

## **VII. Motion *in Limine* to Exclude Expert Testimony on Specific Causation**

The defendant argues that, even assuming the plaintiffs prove that keyboards cause CTDs generally, they cannot produce admissible expert testimony of specific causation (*i.e.*, that keyboard use caused the plaintiffs' injuries). Citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 125 L. Ed. 2d 469 (1993), the defendant has moved *in limine* to exclude expert testimony on the issue of specific causation. *Daubert* requires consideration of whether the reasoning or methodology underlying expert testimony is scientifically valid, and whether that reasoning or methodology can be applied to the facts at issue. *Id.* at 482.

### **A. Dr. Punnett**

Laura Punnett, Sc.D., is an occupational epidemiologist and ergonomist with degrees in epidemiology and occupational health and safety. Deft's Exh. 20 at 1. Based on epidemiological studies and her review of the plaintiffs' occupational and medical histories, Dr. Punnett has opined that the plaintiffs' disorders were caused by their keyboard use. Deft's Exh. 21 at 1, 3-4; Deft's Exh. 22 at 1, 3-4.

The defendant argues that "[s]pecific causation is 'beyond the domain of the science of epidemiology.'" Defendant's Memorandum of Support of its Motion to Dismiss and/or for Summary Judgment with Partial Motion in Limine (Docket No. 25) ("Defendant's Memorandum") at 23 (quoting Federal Judicial Center, *Reference Manual on Scientific Evidence* ("Reference Manual") 167 (1994)). However, the defendant misinterprets the Federal Judicial Center's

discussion of epidemiology.<sup>12</sup> Epidemiological studies can demonstrate that “an individual plaintiff’s disease was more likely than not caused by the implicated agent.” *Reference Manual* at 168-69. I find that epidemiological evidence in general is scientifically valid and can be applied to the facts at issue in this case. *Daubert*, 125 L. Ed. 2d at 482. Accordingly, I decline to exclude Dr. Punnett’s specific causation testimony merely because it is based on epidemiological studies.

Second, the defendant argues that, because Dr. Punnett’s analysis is incomplete, her opinions are inadmissible. The First Circuit has held that, “in order to defeat a motion for summary judgment, an expert opinion must ‘at least include the factual basis and process of reasoning which makes the conclusion viable.’” *Vadala v. Teledyne Indus., Inc.*, 44 F.3d 36, 38 (1st Cir. 1995) (quoting *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88, 92 (1st Cir. 1993)). The *Vadala* court excluded proffered expert testimony as unreliable because the expert “had no idea” whether an assumption on which his opinion hinged was valid. *Id.* The defendant argues that Dr. Punnett did not consider other potential risk factors, the plaintiffs’ complete medical records, the number of key strokes required for the plaintiffs’ jobs, their rest breaks, and their typing speed. Yet the defendant has not suggested that Dr. Punnett’s conclusions depend entirely upon a consideration of those issues. I find that Dr. Punnett’s reports contain sufficient factual basis and reasoning to render her conclusion viable. *See*

---

<sup>12</sup> The source of the defendant’s confusion may lie in the Federal Judicial Center’s discussion of the “frequentist school of statistics.” *Reference Manual* at 168 n.127. In the context of this case, a frequentist might agree with an epidemiological study demonstrating that 75% of keyboard users develop CTDs. *Id.* Yet a frequentist would not conclude that there is a 75% probability that keyboard use caused the plaintiffs’ CTDs because “[t]here is no logically rigorous definition of what a statement of probability means with reference to an individual instance.” *Id.* (quoting Lee Loevinger, *On Logic and Sociology*, 32 *Jurimetrics J.* 527, 530 (1992)). In essence, the defendant’s argument is that probability evidence, by its very definition, cannot prove with absolute certainty what happened in this case. Nevertheless, burdens of proof are necessarily framed in terms of degrees of probability rather than absolute certainty.

*id.* Similarly, I find that Dr. Punnett's failure to consider factors like those identified by the plaintiffs does not render her reasoning or methodology unsound. *See Daubert*, 125 L. Ed. 2d at 482.

Finally, the defendant contends that only a medical doctor may render opinions on the cause of a physical ailment. Dr. Punnett need not be a medical doctor to offer opinions based on epidemiological studies. As discussed above, such studies may allow the jury to infer that the plaintiffs' injuries were more likely than not caused by keyboard use. I deny the defendant's motion *in limine* to exclude Dr. Punnett's specific causation testimony.

### **B. Dr. Welch**

Laura Welch, M.D., practices and researches in the field of occupational medicine. Deft's Exh. 8 at 32. Based on her review of the plaintiffs' occupational and medical histories, Dr. Welch has opined that the plaintiffs' injuries were caused by their use of the Datapoint keyboards in issue. Deft's Exh. 25 at 1, 5; Deft's Exh. 26 at 1, 5-6.

The defendant argues that Dr. Welch bases her specific causation opinions on "an unreliable and incomplete analysis of the Plaintiffs' work and non-work histories." Defendant's Memorandum at 25. In particular, the defendant claims that Dr. Welch did not review the plaintiffs' complete medical records, did not conduct a physical examination or talk with the treating physicians, and did not thoroughly consider other risk factors. *Id.* The defendant has not demonstrated that Dr. Welch's alleged failure to consider these issues renders her conclusions unreliable. *See Vadala*, 44 F.3d at 38. I find the basis of Dr. Welch's reasoning and methodology sufficiently valid to be admitted on the issue of specific causation. *See Daubert*, 125 L. Ed. 2d at 482. Accordingly, I deny the defendant's motion *in limine* to exclude Dr. Welch's specific causation testimony.

### **C. Drs. Labelle, Weisberg, Leschey and Endrizzi**

The defendant argues that, because Drs. Labelle, Weisberg, Leschey and Endrizzi lack specialized knowledge in the field of CTDs, their testimony on specific causation is inadmissible. As the First Circuit has recognized, however, “The fact that the physician is not a specialist in the field in which he is giving his opinion affects not the admissibility of his opinion but the weight the jury may place on it.” *Payton v. Abbott Labs*, 780 F.2d 147, 155 (1st Cir. 1985). *Payton* affirmed the trial court’s admission of specific causation testimony over an objection that the experts lacked “specialized knowledge of the research-type causation question at issue.” *Id.* at 155-56.<sup>13</sup>

Dr. Labelle was Davies’ treating physician, and Drs. Weisberg and Leschey were two of Bowen’s treating physicians. Dr. Labelle has twenty-five years of experience as a hand surgeon, and has witnessed an increasing number of keyboard-related injuries in his practice. Deft’s Exh. 13 at 16-17. He bases his causation opinion on his empirical accumulation of knowledge in treating his patients, and on what he has read in medical journals and learned from his colleagues about CTDs. Deft’s Exh. 14 at 77. Dr. Weisberg, a plastic surgeon with a sub-specialty in hand surgery, has had experience in his practice with CTDs such as those suffered by Bowen. Deft’s Exh. 15 at 14-15. He bases his causation opinions on his years of practice and his continuing review of the medical literature. *Id.* at 31. Dr. Leschey, in over twenty-five years of practice, has dealt “extensively with

---

<sup>13</sup> *Payton* involved proof that DES ingestion by the plaintiff’s mother during her pregnancy caused the plaintiff’s injuries. 780 F.2d at 155. The experts were board-certified obstetrician-gynecologists who had treated and observed the plaintiff for several years. *Id.* at 155-56. They had also treated numerous DES-exposed women in their practices. *Id.* at 156. Both doctors had read some published articles on DES and embryology. *Id.* The court held that any weak factual underpinnings of their opinions affected the weight, rather than admissibility, of their testimony. *Id.*

this type of problem [Bowen's condition]." Deft's Exh. 16 at 6. He has reviewed medical literature on carpal tunnel syndrome and "overuse syndrome," *id.* at 8, and lectures on carpal tunnel syndrome, *id.* at 10. Any alleged lack of specialized knowledge in the field of CTDs affects the weight of their testimony, not its admissibility. *See Payton*, 780 F.2d at 155-56. Accordingly, I deny the defendant's motion *in limine* on the grounds asserted as to Drs. Labelle, Weisberg and Leschey.<sup>14</sup>

As to Dr. Endrizzi, the defendant contends that his lack of specialized knowledge regarding CTDs and his lack of review of CTD literature mandate exclusion of his specific causation testimony. Dr. Endrizzi, a shoulder specialist, treated Bowen's shoulder injuries. Although the plaintiffs argue that Dr. Endrizzi "has treated innumerable patients for shoulder pain secondary to carpal tunnel syndrome," Plaintiffs' Memorandum at 29 (citing Deft's Exh. 17 at 83-89, 118-19), they cite no evidence that he has treated patients for carpal tunnel syndrome itself or reviewed the literature on the relationship between keyboard use and carpal tunnel syndrome. Although a doctor need not be "a specialist in the field in which he is giving his opinion," *Payton*, 780 F.2d at 155, he

---

<sup>14</sup> In its memorandum the defendant argues that Dr. Leschey "acknowledged that he does not have an opinion about any causal role keyboard use may have played in Ms. Bowen's injuries." Defendant's Memorandum at 28 (citing Deft's Exh. 16 at 6-7). At his deposition, Dr. Leschey said:

I don't have any opinion about the role of a specific keyboard or any keyboard in a specific sense. I do think that typing which is -- I understand is a significant part of her problem that she had at The Thomas Agency over the years, I think that was a factor. . . . I think repetitive use of the upper extremities is an accepted contributory factor to carpal tunnel syndrome . . . .

Deft's Exh. 16 at 6-7. The "typing" that Dr. Leschey mentioned clearly referred to Bowen's keyboard use.

The defendant further cites Dr. Leschey's admission that he is "not an expert on the relationship of *specific* keyboards to the development of these types of problems." *Id.* at 5 (emphasis added). This, however, does not preclude Dr. Leschey from giving expert testimony that keyboard use in general caused Bowen's carpal tunnel syndrome.

must base his opinions on reasoning and methodology that are sufficiently reliable to render his testimony scientifically valid. *Daubert*, 113 S. Ct. at 2796. Dr. Endrizzi's clinical experience, as it is reflected in the record now before the court, qualifies him to testify on the relationship between Bowen's shoulder injuries and her carpal tunnel syndrome. It does not, however, provide a sound basis for an opinion on the relationship between keyboard use and Bowen's injuries. Accordingly, testimony by Dr. Endrizzi concerning a causal relationship between keyboard use and Bowen's injuries will be excluded at trial unless the missing foundational element is supplied. In all other respects the motion *in limine* is denied as to Dr. Endrizzi.

### **VIII. Bowen's Shoulder Injuries**

Plaintiff Cynthia Bowen claims that the Datapoint keyboards caused, *inter alia*, "shoulder tendinitis with bone spurs" which necessitated shoulder surgery. Complaint ¶ 7. The defendant claims that Bowen cannot establish that its keyboards caused Bowen's shoulder injuries and seeks to bar her from claiming any damages resulting from her shoulder injuries.

The defendant correctly argues that neither physician who treated Bowen's shoulder injuries is prepared to testify that keyboard use caused her shoulder injuries. Deft's Exh. 12 at 16; Deft's Exh. 17 at 70-71, 114; Deft's Exh. 45 at 1. The plaintiffs, in their statement of material facts, cite statements by Drs. Heinz and Endrizzi suggesting the possibility that shoulder injuries could result from keyboard use, but their statements do not suggest that they saw a causal relationship in this case. Deft's Exh. 12 at 16; Deft's Exh. 17 at 118-19. The plaintiffs, however, also cite the testimony of Dr. Welch who did opine that Bowen's shoulder problems were caused by keyboard use "in the sense that I think they were secondary to her carpal tunnel syndrome." Deft's Exh. 9 at 292, 294.



Dr. Welch's testimony, regardless of the opinions of Drs. Heinz and Endrizzi, is sufficient to create a trialworthy issue on the causal relationship between Bowen's shoulder injuries and her keyboard use.

### **IX. Punitive Damages**

The defendant asserts that there is no evidence in the summary judgment record to support the plaintiffs' claims for punitive damages. Maine law permits punitive damages only if the plaintiffs establish by clear and convincing evidence that the defendant's conduct was motivated by malice. *Tuttle v. Raymond*, 494 A.2d 1353, 1361, 1363 (Me. 1985). There is no evidence in the record to support express malice, which requires a showing that the defendant's alleged tortious conduct was motivated by ill will toward the plaintiff. *Id.* at 1361. Implied malice exists when the defendant's conduct is so outrageous that malice toward the plaintiff can be inferred. *Id.* Mere recklessness is not enough to support a finding of implied malice. *Id.*

The only evidence in the Plaintiffs' Statement of Material Facts on this issue is Dr. Kroemer's state-of-the-art report. Even viewed in the light most favorable to the plaintiffs, this evidence merely establishes that CTDs were "associated with keying tasks," and that "the relation between CTD and design and use of keyboards as input devices was well established" by the 1970s. Deft's Exh. 30 at 39-40. This "association" or "relation" between keyboards and CTDs may create a trialworthy issue on the failure-to-warn claims, but it is insufficient to survive summary judgment on the punitive damages claim. Although one may infer that the defendant should have known or even did know of the "relationship," the evidence supports, at best, an inference of mere recklessness. One cannot infer conduct "so outrageous that malice toward a person injured as a

result of that conduct can be implied.” *Tuttle*, 494 A.2d at 1361. Accordingly, the defendant’s motion for summary judgment on the punitive damages claim is granted.

## **X. Conclusion**

In summary, the defendant’s motion for summary judgment is **GRANTED** as follows: on all counts insofar as they pertain to Datapoint keyboard models 6600, 8600 or 8242; on Count I (negligence) insofar as it asserts negligence based on defective design or a post-sale duty to warn; on Count II (strict liability) insofar as it asserts a claim of defective design; and on Count IV (punitive damages); otherwise, the motion is denied. The defendant’s motion *in limine* is granted conditionally as to testimony by Dr. Endrizzi concerning a causal relationship between keyboard use and Cynthia Bowen’s injuries; otherwise, the motion is denied.

***Dated at Portland, Maine this 31st day of October, 1995.***

---

***David M. Cohen***  
***United States Magistrate Judge***